IN THE

Supreme Court of the United States

October Term, 1958

No. 363

[illegible] Douglas Furnish, M.D.,

Petitioner and Appellant,

vs.

The Board of Medical Examiners of the State of California,

Defendant and Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	PAGE
Statement of case	2
Statement of facts	3
Question presented	4
Statutes involved	4
Argument	7
A conviction of a felony in the Federal Court on a plea of nolo contendere is not a ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code when the "felony" is a misdemeanor under California law, and no showing of moral turpitude has been made	7
Certificate of counsel	9

TABLE OF AUTHORITIES CITED

CASES

	PAGE
People v. Hamilton, 33 Cal. 2d 45, 198 P. 2d 873	7

STATUTES

California Business and Professions Code, Sec. 2383	4, 8
California Penal Code, Sec. 17	5, 7
California Revenue and Taxation Code, Sec. 19401	5, 7
California Revenue and Taxation Code, Sec. 19405	6, 7
United States Code, Title 26, Sec. 145(b)	3, 6

IN THE

Supreme Court of the United States

October Term, 1958.

No. 393.

RICHARD DOUGLAS FURNISH, M.D.,

Petitioner and Appellant,

vs.

THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Richard Douglas Furnish, M.D., prays that a rehearing be granted and that petitioner's Petition for a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 21, 1958, whereby the judgment dismissing the action brought by petitioner for declaratory relief and injunction in the United States District Court against The Board of Medical Examiners of the State of California to set aside its decision suspending petitioner from the practice of medicine for one year was affirmed. Petition for Rehearing was denied on August 7, 1958 [Tr. of Rec. pp. 60-61].

Petition for Writ of Certiorari was denied on November 10, 1958.

Statement of Case.

Petitioner filed a complaint in the United States District Court, Southern District of California, Central Division No. 1305-57-T, against The Board of Medical Examiners of the State of California, seeking declaratory relief and injunction to restrain the Board from suspending the appellant from the practice of medicine in the State of California for one year and to declare the rights of the petitioner [Tr. of Rec. pp. 3-17].

The Honorable Ernest A. Tolin, United States District Judge, issued an order to show cause and temporary restraining order, restraining the Board from suspending the petitioner pending the hearing of the order to show cause [Tr. of Rec. pp. 17-18].

On motion of the respondent the District Court ordered the complaint dismissed for lack of jurisdiction [Tr. of Rec. pp. 19-20, 22-23].

On motion of the petitioner the District Court restored and granted an injunction during the pendency of an appeal, enjoining and restraining the Board from enforcing the order suspending the petitioner from practicing medicine and surgery in the State of California [Tr. of Rec. pp. 20-21].

An appeal was taken by appellant to the United States Court of Appeals for the Ninth Circuit. The Circuit Court affirmed the judgment of the District Court dismissing appellant's petition for lack of jurisdiction, with instructions to terminate the order restoring the original injunction enjoining and restraining The Board of Medi-

cal Examiners of the State of California from enforcing its order of suspension. Appellant's petition for rehearing was denied by the Circuit Court [Tr. of Rec. pp. 60-61].

A Petition for Writ of Certiorari was filed in the Supreme Court of the United States and was denied on November 10, 1958.

Statement of Facts.

Petitioner, a practicing physician and surgeon for the past twenty years, licensed by the State of California [Tr. of Rec. p. 3], was convicted on a plea of *nolo contendere* in the United States District Court for the Southern District of California, Ceneral Division, of two counts of violating Title 26, United States Code, Section 145(b), charging that he attempted to defeat and evade income taxes for the years 1947 and 1948 [Tr. of Rec. pp. 4-5].

The judgment of the Federal Court was that the petitioner be fined the sum of $5,000 on each of the two counts [Tr. of Rec. p. 6].

Thereafter, The Board of Medical Examiners of the State of California on or about November 10, 1955, made an order directing that petitioner be suspended for a period of one year from the practice of medicine and surgery in the State of California, which order was based on the convictions on the pleas of *nolo contendere* hereinabove referred to [Tr. of Rec. pp. 3-4].

That the order of suspension was made after the Board's Hearing Officer proposed that a suspension of one year be stayed, and petitioner placed on probation for a period of three years. The recommendation of the

Hearing Officer was overruled by the Board [Tr. of Rec. p. 4].

The Board of Medical Examiners has stipulated that it did not seek to discipline the petitioner for the conviction of an offense involving moral turpitude. (Stip.)

Question Presented.

Is a conviction in the Federal Court of a felony on a plea of *nolo contendere* ground for disciplinary action against a physician and surgeon under Section 2383 of the California Business and Professions Code if the "felony" is only a misdemeanor under California law and no showing of moral turpitude has been made?

Statutes Involved.

Section 2383 of the Califoria Business and Professions Code provides:

> "The conviction of a felony, or of any offense involving moral turpitude, constitutes unprofessional conduct within the meaing of this chapter. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of *nolo contendere* made to a charge of a felony or of any offense involving moral turpitude is deemed to be a conviction within the meaning of this section. The Board may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing

such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information or indictment."

Section 17 of the California Penal Code provides:

"A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

Section 19401 of the California Revenue and Taxation Code provides:

"Any person who, with or without intent to evade any requirement of this part or any lawful requirement of the Franchise Tax Board under this part, fails to file any return or to supply any information required under this part, or who, with or without such intent, makes, renders, signs, or verifies any false or fraudulent return or statement, or supplies any false or fraudulent information, is liable to a penalty of not more than one thousand dollars ($1,000). The penalty shall be recovered by the Attorney General or the counsel for the Franchise Tax Board in the name of the people by action in any court of competent jurisdiction.

"The person is also guilty of a misdemeanor and shall upon conviction be fined not to exceed one thousand dollars ($1,000) or be imprisoned not to exceed one year, or both, at the discretion of the court."

Section 19405 of the California Revenue and Taxation Code provides:

"(a) Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand dollars ($2,000) or imprisoned in the state prison not more than five years, or both.

(b) The fact that an individual's name is signed to a return, statement, or other document filed shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him."

Title 26, United States Code, Section 145(b), provides:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

ARGUMENT.

A Conviction of a Felony in the Federal Court on a Plea of Nolo Contendere Is Not a Ground for Disciplinary Action Against a Physician and Surgeon Under Section 2383 of the California Business and Professions Code When the "Felony" Is a Misdemeanor Under California Law, and No Showing of Moral Turpitude Has Been Made.

Section 19401 of the California Revenue and Taxation Code makes it a misdemeanor to make a false or fraudulent return required by the State Franchise Tax Board.

Section 19405 of the California Revenue and Taxation Code states, in effect that any person who wilfully makes and subscribes a return which is verified and which he does not believe to be true and correct as to every material matter shall be guilty of a felony and upon conviction may be fined or imprisoned in the state prison.

Section 17 of the California Penal Code provides in effect that when a crime is punishable by imprisonment in a state prison and is also punishable by fine or imprisonment in the county jail, it shall be deemed a misdemeanor for all purposes, if a judgment is imposed other than imprisonment in a state prison.

> "As to a crime which may be either a misdemeanor or a felony, depending upon punishment imposed therefor, it is the punishment specified by the sentence which determines the character of the crime for all purposes."
>
> *People v. Hamilton*, 33 Cal. 2d 45, 198 P. 2d 873.

The sentence imposed on the petitioner for the Federal income tax violation was a fine in the sum of $5,000 on each of two counts [Tr. of Rec. p. 6].

Section 2383 of the California Business and Professions Code calls for discipinary action when the conviction is for a felony, or of any offense involving moral turpitude.

No contention has been made by the California Board of Medical Examiners of moral turpitude being involved and, in fact, it was stipulated that The Board of Medical Examiners did not seek to discipline the petitioner for the conviction of an offense involving moral turpitude. This stipulation is on file with the records of the United States Court of Appeals for the Ninth Circuit.

Since the judgment imposed was only a fine, under California law it became a misdemeanor. The Board of Medical Examiners seeks to discipline the petitioner for what was a felony in the Federal Court but which, under applicable California law would only be a misdemeanor.

A rehearing should be granted, as substantial grounds for the issuance of certiorari are presented herein which have not been previously presented to this Court.

Furthermore, intervening circumstances of a substantial or controlling effect have occurred in that there has been no determination in this matter whether the conviction of a felony in the Federal Court, amounting to only a misdemeanor under California law, may be used for disciplinary action.

Wherefore, it is respectfully urged that the Petition for Rehearing should be granted so that the case may be remanded to the United States Court of Appeals for the Ninth Circuit, for the reasons stated.

Respectfully submitted,

MURRAY M. CHOTINER, and
RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Petitioner Richard Douglas Furnish, M.D.

Certificate of Counsel.

Murray M. Chotiner does hereby certify:

1. That he is one of counsel for the petitioner;

2. That the Petition for Rehearing is presented in good faith and not for delay; and

3. That the petition is restricted to the grounds hereinabove stated;

MURRAY M. CHOTINER.